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No. 95-664

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COUNTY OF CONTRA COSTA, *Petitioner,*

v.

DALE H. VISNESS, *Respondent,*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rules 37.5 and 37.6 of the Rules of the Supreme Court of the United States, the Office of the District Attorney of the County of Tulare, as a political subdivision of the State of California, files this brief as *amicus curiae* in support of a request by the Attorney General of the State of California that this Court issue a Writ of Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit, filed June 12, 1995.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit *In re Visness*, 57 F.3d 775 (9th Cir. 1995) is set forth in the Appendix to the petition filed by the Attorney General of the State of California. In *Visness* petitioner had requested the Ninth circuit to reconsider its earlier decision *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), cert. den. 481 U.S. 1003 (1987), on two grounds: (1) the section of the Bankruptcy Code excepting a debt for unpaid child support from discharge had been twice amended since the bankruptcy court rendered its decision finding that section inapplicable to support judgments entered pursuant to California Welfare and Institutions Code section 11350, and (2) the Court had misconstrued section 456(b) of the Social Security Act which precludes the discharge of a "debt which is a child support obligation assigned to a State." 42 U.S.C. §656(b). As to the first issue, the Ninth Circuit in *Visness* held that the statutory changes in the Bankruptcy Code did not affect its prior holding in *Ramirez* and, as to the second, it held that the panel hearing the matter was bound by the holding of the previous panel. Crucial to the analysis of *amicus* is the statement by the Ninth Circuit that "**(t)his panel is 'bound by decision of prior panels unless an en banc decision, Supreme court decision, or subsequent legislation undermines those decisions.'** " In re *Visness, supra,* at 57 F.3d 778 (bold type added). On July 25, 1995 the Ninth Circuit declined to grant a hearing en banc.

INTEREST OF AMICUS CURIAE

As the agency charged with the enforcement of child support in this political subdivision, the Office of the District Attorney of the County of Tulare represents the interests of the People of the State of California in collecting debts for child support which have been assigned to the county and in collecting support for custodial parents whose children are not receiving public assistance.[1] The district attorney of each county in California has similar responsibilities.[2] All district attorneys therefore have an immediate and significant interest in the dischargeability of debts in bankruptcy which are in the nature of support and assigned to the county.

Tulare County is a rural county in the State of California and is responsible for the administration of approximately 42,500 child support cases.[3] **In this caseload obligated parents owe approximately $21.6 million in uncollected judgments which are based on actions brought pursuant to California Welfare and Institutions Code § 11350.** This figure represents approximately 10.7 percent of the total collectible and unpaid support judgments in the district attorney's office which have been assigned to the county pursuant to section 402(a)(26) of the Social Security Act (42 U.S.C. § 602(a)(26)). It is judgments entered pursuant section 11350 that are dischargeable in proceedings brought under Title 11 of the United States Code.[4]

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1. California Welfare and Institutions Code §§ 11475.1, 11478.2.

2. California Welfare and Institutions Code § 11475.1.

3. A "case" may be defined simply as a support action for a family group consisting of a child (or children), a custodian, and an absent parent.

The *amicus curiae* brief of the City and County of San Francisco sets forth the point that in excess of one-half billion dollars of judgments for support are at risk of discharge under the decision below. *Amicus* joins in that assessment.

SUMMARY OF ARGUMENT

Amicus believes that the decision of the court below ignores the important public policy that support obligations should be exempt from bankruptcy discharge.

ARGUMENT

Amicus will be succinct. The decisions *In re Ramirez*, 795 F.2d 1497 (Ninth Cir., 1986) and of the court below, *In re Visness, 57 F.3d 775 (9th Cir., 1995)* ignore the strong public policy considerations that should prevent obligations in the nature of support from bankruptcy discharge. These concerns are best addressed by Justice O'Connor in *Rose v. Rose* 481 U.S. 619, 95 L.Ed. 2d 599, 107 S.Ct. 2029 (1987) as follows:

"Our Anglo-American tradition accords a special sanctity to the support obligation. Unlike other debts, for example, the obligation to support spouse and child is enforced on threat of

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4. *Amicus* notes that Welfare and Institutions Code § 11350 was amended effective January 1, 1992 to specify that the child support which forms the basis of the judgment is to be calculated pursuant to state child support guidelines as mandated by federal law. Welfare and Institutions Code § 11350(c); 42 U.S.C. § 667. The amendment further specifies that all amounts collected on the judgment in excess of the public assistance paid to the family shall be disbursed to the family. Welfare and Institutions Code § 11350(a)(2). *Amicus* declines to speculate as to the dischargeability of debts for child support entered pursuant this statute as amended.

contempt. These obligations, moreover, may not be discharged in bankruptcy. 11 U.S.C. § 523(a)(5). Indeed, even before the bankruptcy laws specifically excepted the support obligation from the discharge, this Court inferred such an exception, explaining the difference between a support obligation and other debts:

"We think the reasoning of [*Audubon v. Shufeldt*, 181 U.S. 575, 21 Sup.Ct. 735, 45 L.Ed. 1009 (1901)] recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means for enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty not because of any contractual obligation or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty and enforces it against him by means of legal proceedings.

The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children and is not a debt in any just sense. *Wetmore v. Markoe*, 196 U.S. 68, 74-76, 25 S.Ct. 172, 174-175, 49 L.Ed. 390 (1904)." *Rose* v. *Rose*, 481 U.S. 619, 637-638, 95 L.Ed. 2d 599, 615, 107 S.Ct. 2029, 2040 (1987) (Conc. Opn. of O'Connor, J.).

To paraphrase the Court in *Wetmore* v. *Markoe*, supra. Mr. Visness owes a duty to pay Contra Costa County because the County's judgment is a legal means of enforcing his obligation to support his family.

The court below directly contravened the policy stated above: **an absent parent who avoids service of process and delays the establishment of a formal court order is rewarded by the court below**, by being able to discharge his obligation in bankruptcy. This result is a highly inappropriate one.

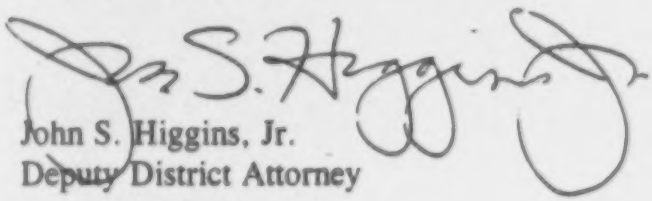
CONCLUSION

The District Attorney of the County of Tulare joins the Attorney General of the State of California and the District Attorney of the City and County of San Francisco in urging this Court to grant the Attorney General's petition for Writ of Certiorari.

Dated: November 22, 1995.

Respectfully submitted,

Phillip J. Cline
District Attorney of the County of Tulare



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